

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re TRENTON B., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

TRENTON B.,

Defendant and Appellant.

F061938

(Super. Ct. No. JJD064423)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Hugo J. Loza,
Commissioner.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda
Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Before Dawson, Acting P.J., Kane, J., and Detjen, J.

On January 6, 2011, appellant, Trenton B., admitted allegations in a subsequent petition (Welf. & Inst. Code, § 602)¹ charging him with evading a police officer (count 1/Veh. Code, § 2800.2, subd. (a)) and vehicle theft (count 2/Veh. Code, § 10851, subd. (a)).

On appeal, appellant claims the juvenile court failed to declare the character of two of his offenses from a prior petition. We will find merit to this contention and remand for further proceedings.

FACTS

On May 22, 2009, a Los Banos police officer responded to a disturbance involving juveniles and found appellant in possession of bolt cutters. Appellant admitted to the officer that he intended to use the bolt cutters to steal bicycles from Los Banos Junior High School.

On May 28, 2009, appellant and two other juveniles used a large rock to break the window of car in Los Banos. When a police officer contacted the trio, one juvenile dropped a bracelet that was taken from the car and a second juvenile was found in possession of a cell phone that was also taken from the car.

On November 20, 2009, in Merced County Superior Court (the Merced court), appellant admitted allegations in a petition charging him with felony second degree burglary (burglary) (Pen. Code, § 459), felony receiving stolen property (receiving) (Pen. Code, § 496, subd. (a)), and possession of burglary tools (Pen. Code, § 466), a misdemeanor.

On January 5, 2010, the Tulare County Superior Court (the Tulare court or the court) accepted transfer of appellant's case.

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

On February 2, 2010, the court granted appellant deferred entry of judgment (DEJ) for a period of 12-36 months.

On March 2, 2010, appellant lit a smoke bomb in a trash can at school, which started a fire in the can.

On March 19, 2010, after appellant admitted one count of recklessly causing a fire (Pen. Code, § 452, subd. (d)), the court again granted him DEJ for a period of 12-36 months, which it incorporated with appellant's previous grant of DEJ.

On October 25, 2010, appellant was driving a stolen van when a Tulare County sheriff's deputy stopped appellant for swerving across the center divider. When the deputy got out of his patrol car and walked toward the driver's door, appellant sped away. The deputy pursued the van as it ran a red light at a speed of 70 miles per hour and forced another vehicle off the road. When the van stopped again, appellant and a passenger were taken into custody.

On November 9, 2010, the district attorney filed a petition charging appellant with evading a police officer (count 1), a felony, vehicle theft (count 2), a felony, and receiving a stolen vehicle (count 3/Pen. Code, § 496d, subd. (a)), a felony.

On January 6, 2011, appellant admitted counts 1 and 2 in exchange for the dismissal of count 3.

On February 2, 2011, the court terminated appellant's DEJ.

On February 22, 2011, the court set appellant's maximum term of confinement at four years eight months² and ordered appellant to serve 45-180 days in a short-term program.

² Appellant's maximum term of confinement was calculated as follows: three years for his burglary offense, a stayed term for his receiving offense, two months for his possession of burglary tools offense, two months for his recklessly causing a fire offense, eight months for his evading a peace officer offense, and eight months for his vehicle theft offense.

DISCUSSION

Appellant's burglary and receiving offenses are so-called "wobbler" offenses, i.e., offenses that in the case of an adult can be punished alternatively as felonies or misdemeanors (Pen. Code, §§ 17, 460, subd. (b), 461, subd. (b), & 496, subd. (a)). Appellant contends that neither the Merced court nor the Tulare court complied with the requirement of section 702 to declare each offense to be a felony or misdemeanor. Respondent contends the Merced court found these offenses to be felonies in taking appellant's plea when it stated that each offense was a felony and the Tulare court made the same finding when it signed an order which stated that it found these offenses to be felonies. We agree with appellant.

Section 702, in relevant part, provides: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

"The language of the provision is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. [Citations.] [¶] The requirement is obligatory: '... section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.' [Citations.]" (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204-1205 (*Manzy W.*).

However, remand is not automatic. "[T]he record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error.... The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

Appellant’s burglary and receiving offenses were described as felonies in the charging petition and appellant admitted the truth of these charges. However, this was insufficient to show that the Merced court understood its discretion to treat these offenses as misdemeanors. (*Manzy W.*, *supra*, 14 Cal.4th at pp. 1207-1208.)³ This is particularly true here because the minute order for the November 20, 2009, hearing at which appellant admitted these charges included a section for the Merced court to list wobbler offenses and declare their character and this section was not filled out.

The Tulare court did not expressly find at appellant’s January 6, 2011, jurisdiction hearing, or at his February 22, 2011, disposition hearing, that appellant’s burglary and receiving offenses were felonies. However, at the conclusion of appellant’s disposition hearing, the following colloquy occurred:

“THE COURT: ... And those two offenses are felonies, [evading a peace officer] and the [vehicle theft].

“THE CLERK: And then he had one that was a transfer in that was a [second degree burglary] and a [receiving stolen property].

“THE COURT: *They’re both designated felonies?*

“THE CLERK: *They were all felonies.*

“THE COURT: All right....” (Italics added.)

³ Respondent attempts to distinguish *Manzy W.* by claiming that in that case the juvenile court never used the term “felony” in any of the proceedings and, here, the Merced court expressly stated that appellant’s burglary and receiving offenses were felonies. However, respondent’s citation to *Manzy W.* does not support this contention. The *Manzy W.* court did not purport to memorialize in its opinion all of the juvenile court’s statements with respect to the wobbler offense at issue there. Thus, even if the *Manzy W.* opinion does not indicate that the juvenile court there referred to the offenses as felonies, this does not establish that the court, in fact, never did. Additionally, we note that since the petition in *Manzy W.* charged the wobbler offense at issue there as a felony (*Manzy W.*, *supra*, 14 Cal.4th at p. 1202), the juvenile court likely referred to it as a felony when it took the juvenile’s plea to that offense.

The foregoing colloquy indicates that the Tulare court understood it had discretion to declare the character of appellant's burglary and receiving offenses but did not do so because it accepted the clerk's apparent representation that the Merced court had already declared these offenses to be felonies.

The minute order for appellant's February 22, 2011, disposition hearing also contained a section for the Tulare court to list wobbler offenses and for it to declare the character of these offenses. The Tulare court listed appellant's burglary and receiving offenses in that section and checked a box indicating that it found each of these offenses to be a felony. However, this did not satisfy the requirements of section 702 because it appears from the comments quoted above that this section merely memorializes the Tulare court's understanding that the Merced court had already declared these offenses to be felonies. (Cf. *In re Dennis C.* (1980) 104 Cal.App.3d 16, 23 (*Dennis C.*) [this court found that a notation in clerk's transcript that juvenile court found wobbler offense to be felony was insufficient to comply with section 702 where transcript of hearing did not support notation]; also cf. *People v. Rodriguez* (1998) 17 Cal.4th 253, 257 [remand ordered where record affirmatively showed that court misunderstood its sentencing discretion].)

Respondent relies on *In re Robert V.* (1982) 132 Cal.App.3d 815 (*Robert V.*) to contend that the Tulare court complied with section 702 through the "Findings and Order" noted above that declared appellant's burglary and receiving offenses to be felonies. In *Robert V.*, at the disposition hearing, the juvenile court signed a "Findings and Order" specifying that "Petition filed 3/24/81 VC10851 felony in Ct I to run concurrent with time still owed on CYA commitment." (*Robert V.*, at p. 823.) In finding that this notation satisfied section 702, the court distinguished *Dennis C.*, *supra*, 104 Cal.App.3d 16, as follows: "This is unlike [*Dennis, supra*,] 104 Cal.App.3d 16, where there was an official transcript but no explicit finding; and that court, because of the

possible oversight, remanded for clarification whether the crime was a felony or a misdemeanor.” (*Robert V.*, at p. 823.)

Robert V. is inapposite. As explained above, the Findings and Orders of the Tulare court relied on by respondent merely reflect the Tulare court’s erroneous understanding that the Merced court had already declared appellant’s burglary and receiving offenses to be felonies. Thus, we conclude that the court erred by its failure to declare the character of appellant’s burglary and receiving offenses.

DISPOSITION

The orders are reversed and the matter is remanded to the juvenile court for a new disposition hearing in light of this opinion.